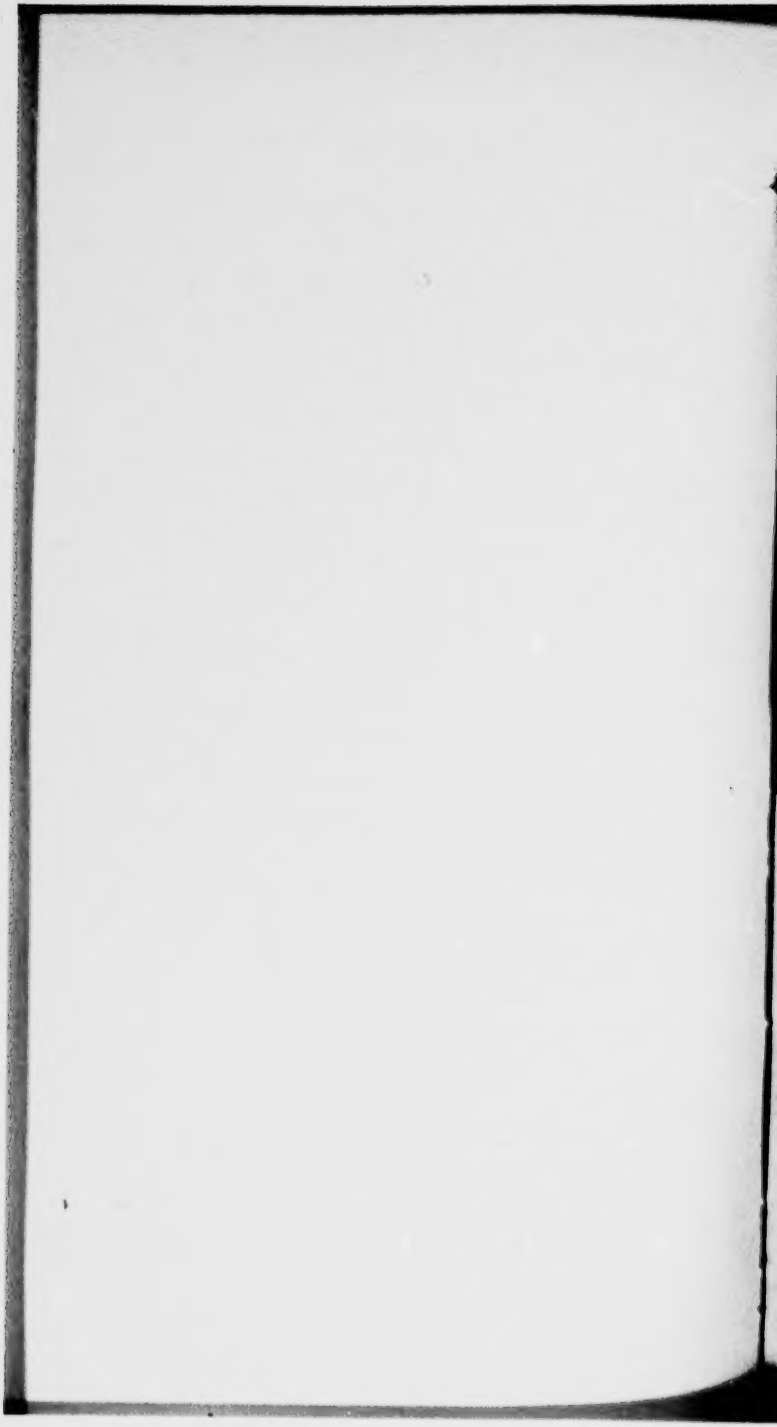

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 175.

Pacific Electric Railway Company,
Appellant,
vs.
The City of Los Angeles, P. W. Powers et al.,
Appellees.

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

In replying to the brief of the appellees, we pass over the first 31 pages of the brief, which is devoted to the proposition that the circuit court had no jurisdiction of the cause, without further remark than to say to this we have already replied in our opening brief. [See Brief, pp. 141-158.]

As to the other points, we take them up in the order in which they are presented in the brief of the appellees.

I.

On page 32 the general proposition is laid down that the appellant did not acquire any valid franchise for the reason that the proceedings for the sale were plainly defective and incomplete, and the first objection made is that the notice of sale did not conform to the requirements of the act of 1901 in the kind of franchise offered for sale.

Under this caption, if we understand the objection, it is that the statute provides, and the appellant applied for, an electric street railway franchise to be constructed and operated upon certain public streets of the city, but the notice described a franchise for a railway along the streets in Los Angeles, to carry passengers and freight. And that it declared that the street railway constructed and operated under the franchise should be used only for the transportation of passengers and United States mail, and for transportation subject to the conditions and restrictions hereinafter mentioned, of baggage and such packages and commodities as could conveniently be handled and carried in closed cars of the character hereinafter described. And other passages of the notice are

set forth for the purpose of showing that this was an electric railway franchise for carrying passengers and freight. And it is said that this is essentially different from the kind of franchise described in, and authorized to be sold by the act of 1901; and this is wrought out upon the supposition that the term "railroad" and "street railways" are two different things always and at all times, and many different cases are cited which are supposed to sustain this contention. Under this interpretation of the meaning of the terms "railroads" and "railways" on the one hand, and "street railways" on the other, it is contended that the carrying of freight upon these cars makes this something other than a street railway franchise, and therefore is a something which was not authorized to be sold by the statute of 1901, the provisions of which are set forth in full in the bill and in the brief. The two provisions of that statute bearing upon this particular question are the following:

> "Sec. 1. Every franchise or privilege to erect or lay telephone wires, to construct or operate *street railroads* upon any public street or highway * * * to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise *any other privilege* whatever, hereafter proposed to be granted by the board of supervisors, boards of trustees, the common councils," etc.

There is an exception from this of *"steam railroads"* and telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves.

Here is the enumeration of the franchises to be granted so far as regards the present controversy, and also of its exceptions. If street railroads were in this statute a term of such import as to exclude the ordinary commercial railroads, why should there have been an exception of "steam railroads"?

Furthermore, why should the legislature, out of abundance of caution, after specifying certain franchises or privileges, then have included all others hereafter proposed to be granted, and then followed this with the exceptions enumerated if it were not intended that every species of franchise or privilege hereafter proposed to be granted should be granted in the manner provided in that act, with certain exceptions, and thus the legislature covered the whole ground, the things the granting of which should be made under the provisions of that statute, and such exceptions from that provision as the legislature saw fit to make. From the very terms of the act itself, therefore, it will be seen that the term "street railways" was not being used in any restricted sense, but was including every kind of railroads except those which it denominated in the excepting clause "steam railroads."

It is not denied, of course, that the term "street railways" in many statutes, and as used elsewhere, may be used in the restricted sense contended for by counsel for the appellees. And that also the term "railroad" is often used in a sense which manifestly is not intended to include street railways. But neither term has imposed upon it any such rigid definition as necessarily excludes the other.

The statutes of this state have shown, in many instances, that the laws prescribed for the regulation of railroads have been intended to apply to both, at least in the main. The Civil Code of this state treats, under one title, namely Title III, "Railroad Corporations", commencing with section 454, and extending to and including section 494.

Street railroad corporations are dealt with under Title IV, commencing with section 497. And at section 510 it is declared that "street railroads are governed by the provisions of Title III of this part so far as they are applicable, unless such railroads are therein specially excepted."

Cook on Corporations, 4th edition, volume 3, section 915, says:

> "Where there is no statute in the state relative to the powers of street railroads, the courts hold that they have generally the same powers that are given by statutes to steam railroads."

And that

> "Where the statutes authorize railroads to consolidate or mortgage their property, a street railway comes within the meaning of the statute."

He says, moreover, that the extent of the street railway companies' right to lay down single or double tracks, freight tracks, switches, etc., depends upon the words of the grant.

And the supreme court of California, in Ferguson v. Sherman, 116 Cal. 169, had before it this question:

The defendant was sued as a stockholder of a Kansas street railway corporation, and the Kansas constitution, section 11, article XII, provided that debts from corporations should be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as should be provided by law, but such individual liability should not apply to *railroad corporations* nor corporations for religious or charitable purposes. The defendant contended, among other things, that he was not liable under the Kansas law, because the street railway corporation was a "railroad corporation" within the meaning of that constitutional provision, and the supreme court, having under consideration this particular question, namely, whether the Electric Rapid Transit Company was a railroad corporation under the

laws of Kansas, and after saying that they approached the consideration of the question with some reluctance because that particular provision of the Kansas constitution had not been interpreted by the courts of Kansas, said:

> "Agriculture was and is one of the most important industries of Kansas. Cheap transportation and a ready market are essential to agricultural success. This the framers of the Kansas constitution well knew, and it is not unreasonable to infer that the exemption held out to stockholders of railroad corporations organized under the laws of Kansas was designed to promote and stimulate the building of railroads within the state in aid of one of its greatest industries. It is not so easy to believe that the purpose of that constitution was to exempt from liability the stockholders of street railways, which are designed merely to facilitate travel and communication upon the public highways of a municipality, while at the same time the stockholders of mercantile, manufacturing and banking corporations, which corporations certainly tend as much to the public convenience and welfare as do street railroad corporations, should be held to a strict accountability. We recognize that the word 'railroad' or 'railway' as used in a law is broad enough to include street railroads, and that many cases have arisen where courts have held that the word does in its signification include such corporations, but when all has been said, each case has been determined upon its own facts, having in view the circumstances of the case, the context, the presumed intention of the lawmakers, and the policy of the particular

state in regard to the matter, and therefore while a large number of cases may be cited in which the courts have held that the statute under consideration dealing with railroads embrace in their provisions street railroads, an equal number could be instanced in which the courts have, under the facts of the case, narrowed and limited the application of the statute, and held that street railroads were not included. It would be difficult, if not impossible, to formulate any rule to govern the determinations. In this state the difficulty is much relieved by the distinction which our codes make between railroad corporations proper, and street railroad corporations. This consideration, however, is entitled to weight. The exemption from liability of stockholders of railroad corporations under the constitution of Kansas is an immunity in the nature of a grant or privilege. There is no rule of construction which makes it mandatory upon a court to hold that 'railroad' must include 'street railroads', and upon the principle that all grants from the state are construed most strongly in favor of the grantor, it would certainly be proper in this case, no reason to the contrary being shown, to narrow rather than to broaden the meaning of the word, and to limit its applicability to the one class which is necessarily embraced within the term; and we therefore conclude that the provision of the constitution of Kansas here under consideration was not designed to apply to stockholders of street railroad corporations."

116 Cal. pp. 177-178.

They conclude this opinion with a quotation from Foote and Everett's Law of Incorporated Companies, which is as follows:

> "Whether any of the statutes relating to railways apply to street railways is an undetermined question. It is a question which arises again and again, as can readily be imagined, since the statutes have very little to say about street railways. Still, for various reasons, it is believed that the great body of railroad legislation of the state does not apply to street railways."

The key note, however, was struck when it was said that the interpretation of these terms cannot be provided for by any general rules, but the law is to be interpreted in the light of all of its provisions, and from the circumstances attending each particular case.

This is further illustrated in the case of the People *ex rel* San Francisco & San Joaquin Ry. Co. v. Craycroft and others, Board of Trustees of the City of Fresno, 111 Cal. 544.

This company was organized under the laws of California and was authorized and empowered to construct, maintain and operate a steam railway for the transportation of passengers and freight from a point at or near the Bay of San Francisco, in a line generally easterly and southeasterly to a point in Bakersfield, in Kern county, a distance of about 300 miles.

The route as laid out passed through the city

of Fresno, and the petitioner had constructed twenty miles in length on such proposed route between Stockton and Fresno. It was necessary for the proper and successful operation of the road, that it should be constructed as laid out, and this involved the right to pass through the city of Fresno upon a line and over and across streets particularly designated in an application which was presented by the petitioner to the respondents. Instead of passing upon the question, the board of trustees resolved to advertise for bids for the sale of this supposed franchise, under the act of 1893.

Before looking at that act, however, we call attention to a provision of the Civil Code, section 470, which declared that no railroad corporation should use any street, alley or highway, or any of the land or water within any incorporated city or town, unless the right so to use the same was granted by a two-thirds vote of the town or city authority from which the right must emanate.

The railroad company was seeking that authority by its application, and was manifestly seeking simply to pass through the city of Fresno along these streets on its way to Bakersfield.

On March 23, 1893, the legislature of California had passed an act providing for the sale of railroad and other franchises in municipalities and relative to granting of franchises by which

it was provided that every franchise or privilege to erect or lay telegraph or telephone wires, and construct or operate railroads along or upon any public street or highway, or to exercise *any other privilege* whatever hereafter proposed to be granted by the board of supervisors, etc., should be granted under the provisions of this act and not otherwise.

Then followed provisions for the sale of these franchises, which was the first of the California acts providing for such sale.

See Stats. of 1893, p. 288.

The claim was that this application came within the provisions of the statute of 1893, and the board was proceeding to sell the franchise when this petition was presented to the supreme court of California to compel the board to act upon the application. And the question was, whether the franchise came within the provisions of the statute of 1893, and the supreme court of California held that it did not, and gave amply sufficient reasons therefor. Said that it referred to franchises where there could be a real competition, and that an application which was to effect the passage of a railroad from one city in the state to another, through some other city, that a right of way through its streets for the purpose of proceeding on its route admitted of no compe-

tition, and was not the subject of a sale. But we call special attention to this language:

> "It cannot be denied that the language of this act is broad enough to include the franchise and privilege which the petitioner seeks. But a statute will not always be held to include every case which falls within its literal terms. * * * The word 'railroad' is certainly broad enough to cover a steam railroad, and the privilege of laying and operating a steam railroad through a city is clearly included in 'any privilege whatever', but at the same time, if it is perfectly evident from the whole design of this act and other acts that the legislature could not have intended the consequences of a literal construction of the language above quoted, such a construction cannot obtain."
>
> *Id.* p. 547.

In many cases the term "railroad corporations" has been held to include street railroads.

People v. Brooklyn etc. Ry., 89 N. Y. 75;

City of Chicago v. Evans, 24 Ill. 502;

In re S. S. v. Ry. Co., 115 N. Y. 442;

Johnston, Administrator, v. Louisville City Ry. Co., 10 Bish. 231;

Hestonville R. R. Co. v. Philadelphia, 89 Pa. St. 210;

Melvilleborough v. Ferguson Ry. Co., 131 Pa. St. 16;

C. N. Bank v. W. A. Ry. Co., 13 Allen (Miss.) 105;

City of Quincy v. Ry. Co., 37 Ia. 61.

The cases cited by the counsel for the appellees supposed to be to the contrary, are simply illustrations of what the supreme court of California has said in the Craycroft case, and Ferguson case. They have passed upon the interpretation of particular statutes, under the circumstances of each case, and have under consideration particular powers or purposes, or the effects of such construction upon the rights of abutting owners.

The case of Chicago & N. W. Ry. Co. v. M. R. & K. E. Ry. Co., 37 L. R. A. 856, was of this latter character, and the question was whether or not the railway under consideration imposed an additional burden upon the property of an abutting owner, owning to the center of a street, for which it was entitled to compensation.

We may say, however, that here in this state it has been settled that the construction of an ordinary commercial railway in the streets of a city does not impose an additional burden entitling the owner of abutting lots to compensation.

Montgomery v. Santa Ana-Westminster Ry. Co., 104 Cal. 186.

And the same is true of the construction of street railways.

It follows upon these authorities that whether or not the act of 1901 authorized the granting of such a franchise as this, is a question of the construction of the terms of this particular statute,

and that construction is not controlled by the mere use of the terms "street railroads" nor simply "railroads", but is to be ascertained from a view of the whole act.

These terms do not compel us to a conclusion as to the particular motive power employed, or the uses to which they are devoted. The power here given is to construct or operate street railroads * * * to erect poles or wires for transmitting electric heat and power and finally to exercise any other privilege whatever hereafter proposed, etc.

Now there is nothing in the nature of ordinary commercial railways that precludes them from exercising the powers and franchises of a street railway company, within the limits of a city, though they may extend across the continent. This is shown by the statutes of this state, and by the decision of the supreme court in Buswell v. Southern Pac. Company, 114 Cal. 445.

That company was organized under the act of May 20, 1861 [Stats. of 1861, p. 607 *et seq.*], and in section 21 [*Id.* p. 618], power was given to boards of supervisors and common councils, etc., to give, grant or donate to any railroad corporation then or thereafter organized under the laws of the state, the use of any of the streets or highways which might be absolutely necessary in order to enable such company to reach an accept-

able point for a depot in any city, city and county, city or town, or to pass through the same, on as direct a route as possible, to accommodate the traveling and commercial interests thereof. And it contained this provision:

> "Provided, however, the provisions of this section shall not apply to any street railroad now constructed or hereafter to be constructed in any of the incorporated cities of this state, nor shall any railroad company who may avail themselves of the provisions of this section ever use their road for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another in the same city."

Now it would scarcely have been necessary to make this prohibition if the term " railroad " and "railroad corporation" did of themselves exclude the exercise of the powers of a street railway company.

The case of Buswell v. the Southern Pacific Company above cited, was an action for a mandatory injunction to compel that company to grant to persons in the city of Oakland the right to ride on defendant's trains on 7th street without compensation. This application was denied, and the supreme court said the general public did not have any such right; that the provision of the act of May 20, 1861, above referred to, was passed for the very purpose of preventing these railroad corporations from entering into

competition with the local street railways, and to hold that they were bound to carry passengers for nothing was to defeat the very object the statute had in view. But it is nowhere intimated that but for that prohibition there was anything to prevent this railroad corporation from carrying passengers from one point to another in the city, and charging fares therefor.

The provisions of the act of 1861 were carried into the Code as originally adopted. [C. C. Sec. 471.] But it was repealed in 1878, and has never been re-enacted since, and there is now no such prohibition.

But here, both by the statute and the supreme court decision it is clearly implied that the fact that a railroad corporation may be a general commercial railway for the purposes of transportation of passengers and freights to various parts of the country does not prevent it from also acting as a street railway within the limits of a particular city.

In Newell v. Minneapolis, Lynndale & Minnetonka Ry. Co., 35 Minn. 112; s. c. 59 Am. Rep. 303, it was directly decided that the fact that a railway was operated in a city or town, and also to points outside of the city or town, did not prevent it from being a street railway within the city.

We quote the following passage, 59 Am. Rep. 307:

> "Upon its findings of fact the trial court was of the opinion, and so found, as conclusions of law, (2) that defendant's railway constructed and operated on First avenue, south and elsewhere within the limits of the city as bounded when this action was commenced, was and is a passenger street railway, and its character is not changed by the fact that between some point outside of the said city limits and Lake Minnetonka it ceases to be a passenger street railway."

Looking, then, particularly at the provisions of our statute, it will be noticed that in the description of the franchises, the construction and operation of street railroads is not only not limited to the carrying of passengers, but the purposes are not mentioned at all specifically, and if any such limitations exist, it is because "street railroad" *ex vi termini* excludes the carrying of anything except passengers. But even if this were the case, the power is given, and the duty imposed, to grant in the manner prescribed by this statute, any other privilege whatever. And as the supreme court said of this same language in the Craycroft case, these terms are broad enough to include the selling to a street railway corporation a franchise to carry freights in connection therewith. So the question is, does the statute, properly interpreted, warrant the selling of this particular franchise?

Legislatures must be supposed to enact laws in the full knowledge of the manner of conducting

business of public importance particularly, and to bring to the discharge of their duties knowledge of the progress or civilization in every direction, including the methods and facilities of transportation, both of freights and passengers, as well also the carrying and distribution of the mails.

Now for many years the custom of transporting and distributing the mails in the cities of the United States through the medium of mail cars operated upon the common street railways has been in existence, and constantly growing. With the knowledge of the application of electricity as a force to the movement of vehicles, its use has been extended to almost every form of vehicle, and has, in a great measure, already been substituted for steam, horse power, and all other power for the movement of cars upon railway tracks. And it has long since ceased to be limited to the operation of railways within a particular city, but it has itself been one of the chief factors in the business of transportation, that has led to the connecting of towns and cities within comparatively short distances, by railways operated by electricity, and offering conveniences to the public in travel, and in the transportation of freight such as it has never enjoyed before.

And there is probably no city in the United States of the population of the city of Los An-

geles that has so many of these so-called suburban railways. From the city of Los Angeles as a center, these roads extend to nearly all the towns not only in this county, but adjoining counties, and franchises such as the present exist in numerous cases, and by means of them not only may passengers carry their baggage with them from place to place, but the country people all along these lines are enabled to market their produce in any one of many towns, by means of the freight cars operated upon these roads, and these things have been going on for years. It is not unreasonable to suppose that when the legislature was using the terms employed in the statute, it did so in the face of these methods of business, and facilities for transportation already in common use. Not only may we presume that the legislature had these matters in mind, but the courts also take judicial notice of the common practices with respect to the transaction of business which are generally known. They take notice of the system of checking baggage by railroads over several lines to the end of the route; the custom of railroad companies to transfer from one to another, loaded cars for continuous transportation over different lines; the nature and business of mercantile agencies; the methods of transporting accepted by railroads; the changes in modes of business, and new methods of carrying on trade;

the general mode of conveying the public mails; the ordinary powers of cashiers of banks; the powers of superintendents of railroads; the custom of banks to remit by drafts instead of sending specie; that engineers are employed to establish railroad courses, and that railroad trains are directed and controlled by the owners of the road. 1st Jones on Evidence, sec. 133.

And in support of these propositions, or some of them, see,

Isaacson v. N. Y. Central R. R. Co., 94 N. Y. 278; s. c. 46 Am. Rep. 142;

Eaton v. Berry, 33 N. Y. 31; s. c. 38 Am. Rep. 391;

Wiggins Ferry Co. v. Chicago Elevated R. R. C., 5 Mo. App. 347;

Sacalaris v. Eureka & Palisade Ry. Co., 18 Nev.; s. c. 51 Am. Rep. 737.

And courts take judicial notice of whatever ought to be generally known within the limits of their jurisdiction.

1 Greenleaf on Evidence, sec. 6.

In view of these well known methods of carrying on the business of these railways, and of the fact that the bounds of their usefulness are constantly being extended, as is equally well known, it is submitted that the broad language used in this statute was undoubtedly intended to

meet these well-known methods of doing business, and even to go farther than this, and by the use of these terms susceptible as they are of expansion, to keep pace with the constant changes and progress in the facilities for the transaction of business, changes which, once adopted in one place, become almost essential in every other. And it is an exceedingly narrow construction of the statute to say that it did not authorize the sale of those franchises which had thus become among the most useful expedients to meet the progressive demands of the age, and as we have shown that the language employed in these statutes does not necessitate any such strict construction, there exists no reason for any such limitations upon the powers provided for by this act.

II.

The second objection to the proceeding is that two franchises were included in the sale. [Brief of appellees, page 38.]

Of this we had something to say in the opening brief. But the point of attack made by our adversaries in the present brief is that part of the description of the franchise to be sold which, after carrying it to the intersection of Mateo and Palmetto streets, continues thus: "Thence northerly over private right of way to the intersection of Fourth street and Santa Fe avenue."

And it is contended that this private right of way made a break in the route of the proposed street railroad, with these last two words italicised, separating it into two independent parts, and rendering necessary two distinct franchises, which under the act of 1901 could only be sold singly [*Id.* p. 39.]

It will be noticed now that there is no pretense that this route thus described is not one continuous route, and that there would be no break in the operation of the cars or necessity of changing from one to another if the road should be constructed over this private right of way. In other words, the break exists only because a part of the road, if constructed along the route, would go over the private right of way. This objection appears to be founded upon two different grounds:

1. The supposed authority of the case of Beekman v. Third Avenue R. Co., 47 N. E. 277.

2. A lack of power in a street railway company to condemn property for its use.

There is nothing in either of these objections. In Beekman's case, the court had under consideration an act which was providing for the granting with the consent of the local authorities, to construct such roads or extensions of street surface railroads, one of the provisions of which was that whenever such consent should provide for the

sale, at public auction, of the right to construct and operate a *branch* or extension of an existing railroad, such consent shall provide that but one fare shall be exacted for passage over such branch or extension, and over the line of road which shall have applied therefor, etc.

The application was for the sale of two branches or extensions of the same railroad. And the court said, among other things:

> "The first and most important question is whether the common council has the power to make a valid sale of the franchise for more than one branch or extension of an existing railroad at the same sale and under the same bid. Or, in other words, does the statute contemplate that consent may be given to the construction of two or more branches or extensions of an existing railroad in one official act, and the franchises sold together as one upon the same bid?"
>
> 47 N. E., p. 279.

Again:

> "The statute evidently contemplates that what is called a branch or extension of an existing railroad shall be constructed and operated under a franchise applied for by that railroad, and when put in operation the branch or extension shall, for certain purposes, be deemed to be a part of the road making the application, even though the franchise to construct the branch shall be acquired, and a new road operated by another corporation. * * * The language of the statute seems to contemplate the sale of a franchise for a single branch or exten-

sion, and not several branches or extensions grouped together."

Now the court enters into a very full discussion of the provisions of the act, and of the reasons which brought them to the conclusion that the local authorities had no such power, and they said, among other things:

"But perhaps the weightiest reason for this view is to be found in the fact that a sale of the franchise for several branches or extensions of an existing railroad at one time and under one bid would defeat the general purpose of the statute, and enable the common council, in most cases, practically to select the purchaser of the right. This may be illustrated by the situation existing in this case, and which has been very clearly pointed out by the court below. The southerly part of the extension or branch intersecting the main line of the defendant's railroad is practically of no use to any other corporation. This is separated from the northerly branch or extension by a part of the line of the defendant, about half a mile northerly. This north branch in itself would constitute an extensive railroad many miles in length, and other corporations might desire to compete for the franchise for its construction and operation, and yet they would be unable to do so except upon the condition that they also purchase another franchise, and construct and operate another railroad where it would be wholly impracticable. Where several franchises are exposed for sale the successful bidder must buy all, and in case of sale of several branches or extensions of an existing road in

this manner, it is easy to see how all competition at the sale may be practically suppressed."

Id. 280.

They then proceed to show that that would be the case in many instances, and was in that case. These two branches being separated by a distance of half a mile, whoever bought both could make no use of the southerly branch except by running over the main line of the corporation making the application. This the corporation making the application could, of course, do without any difficulty. But if another corporation purchased, it was obvious that although the corporation making the application might also grant its consent to the use of its road, yet that was not at all essential to the power of the common council. If it had the power, such consent was not necessary to its exercise, and in many cases might be withheld. And even when given, the corporation purchasing a branch would necessarily, in many instances, and might in all, be compelled to go to a vast expense which the corporation applying for such branches or extensions would not be required to undergo. For instance, if the purchasing corporation other than the applicant was propelling its cars by electricity, while the applicant corporation was a cable railway, if the electric corporation purchase, even with the consent of the company applying, to the use of its road, it

would be compelled to go to no inconsiderable expense in adapting that road to its uses, an expense which the applicant corporation would not be required to incur.

The case not only is no parallel to the present case, but bears no resemblance to it. As we have already stated, it is not pretended that one corporation purchasing here would have any advantage over another. The break, if it exists at all, exists for one as well as the other. And to get over this private right of way, any corporation purchasing is bound to resort to the same means that any other corporation purchasing would have to resort to, and no other. So that the question resolves itself into a mere naked question of the right of the council to sell, not two franchises, but one franchise to construct and operate a street railway line, provided the route designated requires going over private property at all. It is no more two franchises, we submit, than the ordinary steam railway franchise to construct and operate a railroad across the continent or through the state of California from the northerly end to the southerly, is two franchises.

Hence we say, it might be admitted, and is admitted, that the act of 1901 didn't contemplate the sale of several different franchises at the same time and under the same bid, but it is submitted that this supposed separation into two

franchises is purely arbitrary, and that the question here is not whether the council could sell two franchises under the same bid but whether it can sell one franchise if any part of the route ever touches private property, or a private right of way.

Now, in order to sustain the proposition for which the counsel for the appellees contend, it is claimed that a street railway company or the owner of a street railway franchise cannot condemn a right of way over private property. The language of the brief is, "But we submit that the power of eminent domain cannot be exercised for the purpose of acquiring a right of way on which to build street railway tracks."

Brief of appellees, p. 44.

We are told that the statute law of California upon the subject of eminent domain is contained in Title VII, sections 1237-1263, and that section 1238 specifies the public purposes for which the right of way may be exercised. And we are told, also, that the right of a street railroad company to condemn property must be found in subdivision 4 of section 1238, of the Code of Civil Procedure, or not at all. And then follows the quotation of that subdivision. [Brief, p. 44.]

It is perfectly obvious from the quotation that the power is explicitly given. Among the purposes for which this right may be exercised as

defined in this subdivision 4, are: "for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric and horse railroads." And then we are gravely told that the term "street railroads" is not found in that provision, and of course, the counsel is here returning to his proposition that the term "railroads" has not only a distinct meaning, but that that meaning does necessarily exclude from its purview "street railroads." As we have said before, this is not the case, and in this subdivision we have electric and horse railroads. But a horse railroad which is not also a street railroad is, so far as we are advised, a thing utterly unknown.

But this is not the only source of power of these railroad companies to exercise the right of eminent domain. In the enumeration of the powers of railroad corporations in the Civil Code, section 465, provisions are made for the condemnation of property by those companies for various purposes. They may cross, intersect, join or unite their railroads with any other railroad at any point upon its route and upon the grants of such other railroad corporations, with necessary turnouts, sidings, switches, etc., and if the two corporations cannot agree upon the amount of compensation to be made therefor, then the same is to be ascertained and determined as provided in Title VII, part 3, in the Code of Civil Pro-

cedure, which is the title and part providing for the exercise of the right of eminent domain.

C. C., sec. 465, sub. 6.

Subdivision 7 gives the power to condemn to obtain lands, timber, sand, gravel and other material to be used in the construction, etc.

And the provisions of this Title VII on railroads generally, as we have already stated, are declared by section 510 to extend to street railways so far as they are applicable. The power is therefore given, both in the Civil Code and in the Code of Civil Procedure.

And still further: every grant carries with it the power to do those things which are necessary to make the grant effective. The grant of a franchise to construct and operate a street railway necessarily carries with it the right to exercise those powers essential to the enjoyment of the thing granted, and every street railway grant could only be made effective through the exercise of the power of eminent domain or by the purchase from the owner of lands. Independently of the mere laying down of tracks it is, of course, matter of public knowledge that the construction of vast power houses with all the machinery for generating electricity, is necessary to the operation of an electric railway. And moreover, these plants cannot be erected in the streets. They are necessarily constructed on private property. And

if the property cannot be purchased from the owner, the power to condemn must exist, or the franchise be worthless.

So with the cable railways, and even horse railways. Barns and stables and sheds for the shelter of cars not in use, and many other adjuncts, are absolutely necessary to the operation of cars by any motive power, and these things cannot, any of them, be constructed in the public streets. The right to acquire private property by condemnation is essential to the enjoyment of any of these grants.

In Eachus v. L. A. Con. Elec. Ry. Co., 103 Cal. 614, it was held by the supreme court that an electric railway company cutting down the street and changing its grade for the purpose of constructing its road, was liable to the owner of abutting property for any damage done to his property by making such excavation. And certainly if a street railway company has no right to construct its road so as to damage an abutting owner without paying those damages, it could maintain a suit to condemn before it constructs the road. It would be absurd to say that it was an unlawful act to so construct a street railway as to do damage to an abutting owner, and yet the only way it has of constructing it is to commit the trespass or the nuisance, and suffer itself to be sued for damages.

In Bigelow v. City of Los Angeles, 85 Cal.

614, it is manifest that the court entertained no doubt of the power to condemn. That was a suit to enjoin the construction of a viaduct across the Los Angeles river, and over which it was proposed to operate a cable railway as well, and the Los Angeles Cable Railway Company was one of the parties respondents in that case, though not named in the report of the proceedings. It was an appeal from an order refusing a preliminary injunction, which injunction was refused, though mainly because the plaintiff had sat still until the work was almost completed and was about to be put in operation. And as it was a viaduct over one of the principal thoroughfares of the city, and a street railway was to be operated over it for the benefit of the public, and it not being claimed that the parties were not responsible in damages, the court refused to grant a preliminary injunction, and the supreme court, while affirming that order, said:

> "Counsel for appellant seems to fear that unless the city is compelled to make compensation before the work is completed, plaintiff will be left without a remedy for the damages sustained by her, the provisions of the Code with respect to eminent domain being the only procedure prescribed for assessing the damages. In Reardon against San Francisco * * * the court said 'if compensation has not been had in condemning the land for the street under the statute for

such condemnation, it can be recovered in an action.' "

85 Cal. 618.

It is submitted that the proceeding is not amenable to the objection here considered.

III.

There was no unlawful discrimination.

Concerning this proposition, we think little more need be added. The power of the legislature to provide for the sale of a franchise for constructing steam railways is as unquestionable as its power to provide for the sale of franchises for street railways. If such an act were passed, and with all the provisions contained in this act, it would hardly be claimed that the power thus given would be ineffectual because impossible to avoid discrimination, yet it is obvious that every person over whose land the route lay would have exactly the same advantage which is claimed to pertain to this owner of the right of way. He himself would not be compelled to condemn his own property. And yet no discrimination would exist, and for this plain reason: he, the owner, is not entitled to anything for passing over his property except a just compensation, and this is a compensation for the damage done him by the mere fact of the construction and operation of

the road over his premises. But that damage he would suffer if he constructed the road himself, and the only difference that would exist in his case would be that in the case of being the purchaser himself, he does not pay himself the damage which he suffers, but he loses it just the same. The one thing is, in legal contemplation, the equivalent of the other. If condemned by another, he receives the legal equivalent for the thing taken. If taken by himself, he suffers the same damage in legal contemplation, and must either compensate himself in the amount bid, or advantages accruing, or not at all. And if any discrimination existed, either way, it would rather be against him who owns the right of way than in his favor.

But the consideration of this question is itself sufficient to show that that is not the character of discrimination which the statute is preventing. Probably no street railway franchise could be devised in which all of those in the city or in the world who might be tempted to bid, would stand on exactly the same footing. Suppose one railway corporation owned a tract of land favorably situated for the construction of a power house to operate the railway along the franchise proposed to be sold, and another company did not own any such site. Surely this would constitute no discrimination. The meaning of the term was not

that the council should take pains to see that all corporations stood on exactly the same footing with respect to the franchise proposed to be sold, but that one should not be favored by the council against another. Already existing advantages or circumstances not contrived by the council nor created by its act, which may be more favorable in the case of one corporation than another, does not fall within the term "discrimination."

Besides, if such a clause might so operate that fact does not appear in the case, and could not be available upon a record where the sufficiency of the bill is alone in question.

Neither is it true that this bill indicates that the right of way has already been acquired for street railway purposes, for if it has, it would not be a private right of way at all, and besides that, would constitute no objections to it. The Civil Code of this state deals with this very question, and itself suggests a complete answer to this claim of discrimination.

Two lines of street railway operated under different managements may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly. But in no case must two lines of street railway operated under different managements occupy and use the same

street or tracks for a distance of more than five blocks consecutively.

C. C., sec. 499.

Now if this alleged private right of way were for street railroad purposes, that does not hinder that another street railway corporation may pass over its way, or even its tracks.

This provision of the statute has been repeatedly before the supreme court of this state, and no question of its validity exists.

In the Los Angeles Traction Company (another street railway company) against Wilshire, 135 Cal. 654, 658-659, which was a suit to recover a subscription to this railway, the court said this:

> "The respondent purchased the right to, and used, the track of another street railway company that had been previously built, for a distance of some eighteen hundred feet, and it is contended that this is not a compliance with the contract to 'build the road.' We think the contract must be held to have been entered into with full knowledge of the law contained in section 499 of the Civil Code, which reads as follows":

Here follows a copy of the section which is quoted, and the court added:

> "The contract was complied with when this section was complied with as to the portion of the line of railway affected by said section."

Now this very provision is itself proof that the supposed discrimination in this case does not

exist. Any railway corporation in the city whose track was included in the franchise for a distance of five blocks, would have the same kind of an advantage in the bidding that is complained of here. And if several different streets which it occupied for a considerable distance were also included within the franchise for a distance of five blocks on each street, so much the more advantage would it have over any other corporation or person who had not a railway already constructed, and also included within the franchise. Hence, according to the theory of our adversaries, the council could not offer a franchise for sale where the route entered anywhere upon the line of an already existing railway belonging to some street railway corporation or individual, because, forsooth, that company or individual would thus have the advantage over others not similarly circumstanced; and yet the franchise is one which the statutes of this state distinctly provide for, and certainly when the legislature was providing for offering such a franchise for sale, it did not intend to circumscribe those franchises within narrower limits than those provided by law. It is not to be thought that the legislature here designed to repeal the provision of the Civil Code on this subject, but nevertheless, that is the effect if counsel's contention be correct.

There is no longer the power to grant the franchise at all except in the manner prescribed

by this act of 1901, and if a franchise cannot be extended on the track of another company at all for a distance of five blocks, or any distance, then there could be no further grant of a franchise in any city in the state of California that would be permitted to occupy the same street and track of another company for any distance at all. It is submitted that this is not the kind of advantage which is prohibited by the clause here under consideration.

Neither does section 1241, C. C. P., offer any difficulty whatever. As we have already shown, the fact that a street is already appropriated to the purposes of one street railway corporation does not prevent its being used by another for a distance of five blocks. Besides, the section referred to does not receive a very strict construction. A particular route sought to be condemned by a railroad company for the use of its road is not rendered unnecessary by reason of the existence of another route equally good and convenient, both for the property owner and the company.

Cal. Cent. Ry. Co. v. Hooper, 76 Cal. 404.

If this private way is a way for a street railway the mode of getting over it is very simple. It is provided for by the provision of the Civil Code already cited and by the procedure described in

Pac. Ry. v. Wade, 91 Cal. 449.

IV.

The bid of the appellant under which it claims to have acquired the franchise was not illegal or void as claimed by appellees' counsel in their brief.

Brief of Appellees, p. 51.

This subject we have fully treated in the opening brief. Counsel for the appellees evidently agree with us that the learned judge of the court below made the most of the provisions of this statute in support of his decree.

A word or two in response to some additional remarks in the brief upon this subject is all that is necessary here.

In Murdock's case, cited in appellees' brief, pages 54-55, the court had adopted its own means to protect itself against the abuse of its own order, and having, as it seems, just reason to believe that some one or more persons intended to outbid all others with a design to embarrass the court, the court ordered the trustee to report two or more persons as the highest bidders upon the express conditions that if he who was reported as the highest bidder did not comply with the terms of the sale, the next highest bidder might be received and considered as the purchaser. Now, would anybody contend that the court was bound to award to the next highest bidder, whatever he may have been construed to be? The court in that case had ample power to effect its own pur-

poses and to protect itself and its officers and the litigants before it against a fraud of any kind. We are dealing with a statute not framed with reference to a particular case, but establishing the regulations by which all cases were to proceed, and it is not denied that the object of this act was to obtain the best price that might be secured for the franchise, and we are not contending that this means that the municipality is free to depart from the mode of obtaining that price which is *prescribed by the statute.*

The question here is, what is prescribed by the statute? We contend that while the term the "next highest bidder" is fairly susceptible of the interpretation put upon it by the learned judge of the court below, it nevertheless is not so explicit as to exclude all other interpretations. And that when it is admitted that under that interpretation the statute may not only be defeated, but actually would have been, and if the decision of the court is correct, has been defeated in this case, then we say, if the language, without doing too much violence to it, is susceptible of an interpretation by which a cheat may be baffled, and the objects of the statute secured, then that interpretation should be adopted, and if we are correct in our interpretation, then we say again, we are not contending that the court can depart from the mode prescribed by the statute, but that is the mode prescribed by the statute.

V.

An ordinance, or resolution adopted and approved in the same manner as an ordinance, was not essential to the granting of this franchise.

Of course the meaning of the counsel here under this subdivision V [Brief, p. 56], is that it must be approved by the Mayor. Of this also we have fully treated, and shall touch only on the points made by the appellees, and not noticed in the opening brief.

The act of 1897 [Stats. of California, 1897, p. 190], it will be observed, antedates the act under which these proceedings were had by four years. The same power which passed the act approved March 27, 1897, passed the act of March, 1901, under which these proceedings were had, and necessarily repeals it so far as the granting of the franchise is concerned, if in conflict with it.

The act of 1901 does prescribe the mode in which the action of the legislative body shall act. The mistake which counsel for the appellees, we submit, are constantly making, is in supposing that the council of this city in proceeding under the act of 1901 is exercising its legislative powers. That the granting of a franchise is, in a certain sense, a legislative act, is conceded, but we deny that the instrument of grant is any more a legislative act than a patent of the United

States or of the state of California for the public lands, is a legislative act. The legislative act in this case is the act of 1901, not the proceedings of the council under those provisions, and we submit once more, that the council is not here acting in a legislative capacity or any other capacity than that of the mere agent or instrument which the state itself has appointed for the purpose of making the sales of franchises. This we have shown in the opening brief.

See pp. 124-128.

The mistake of counsel for the appellees appears in the very use that they make of the provisions of the statute. Thus, on page 59 of the brief, say they: "The necessity for an ordinance adopted by the city council and approved by the mayor or passed over his veto, is to be found not only in the act of March 27, 1897, but also in the city charter of the city of Los Angeles. The charter of the city of Los Angeles provides that all *legislative power* of the city is vested in the council subject to the power of veto," etc.

To make this language applicable, this must be the exercise of the legislative power of the city which we say it is not. But it was the attempt to exercise their legislative power to defeat the rights acquired by the appellant under its franchise, that violated the contract rights of the ap-

pellant, and attempted to divest it of the property which it had acquired. And it is sufficient upon this subject to say again, that such a construction of the statute does just as completely nullify it as to say that "the next highest bidder" must receive a construction that enables any person, at his mere whim or caprice, to defeat the objects of the statute.

The statute says that it shall be struck off and granted to this highest bidder, whomsoever he may be. Counsel say it may do so with the permission of the mayor.

We deem it unnecessary to pursue this argument further, or give any atention to the authorities cited in support of that proposition, for the whole argument is constructed, and the authorities cited, upon an assumed character attaching to the powers herein exercised, which does not exist.

Where the entire procedure is prescribed and regulated by the statute, and this tribunal to whom its administration is committed is imperatively commanded to make the grant, then in making it, it is not exercising legislative power. The statute itself makes the grant, when the conditions upon which the right to it depends have accrued.

VI.

No question has so far been made of the jurisdiction of this court on an appeal direct from the Circuit Court.

Whether this jurisdiction is conceded, or it is thought that the objection may be made at any time, we are not sufficiently advised. But in anticipation of such claim being made, we submit that the appeal could only be taken directly to this court, and the jurisdiction does exist here, and this is fully established.

Union & Planters Bank of Memphis v. City of Memphis, No. 67; same title, No. 221; 189 U. S. 71; 47 L. Ed. 712.

It is respectfully submitted that the judgment should be reversed.

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